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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

PETITION OF COMMON CAUSE, HENRY GELLER, BENTON FOUNDATION, AMERICAN ASSOCIATION OF RETIRED PERSONS, CENTER FOR RESPONSIVE POLITICS , ET AL., FOR INQUIRY OR RULEMAKING TO REQUIRE FREE TIME FOR POLITICAL BROADCASTS

Richard E. Neustadt
Henry Geller
1750 K Street, N.W.
Suite 800
Washington, D.C. 20006
202-429-7360

October 21, 1993

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mmb-Political

SUMMARY

Petitioners, a group of non-profit, disinterested organizations, request that the Commission commence a proceeding, either of an inquiry or rulemaking nature, to adopt a policy requiring broadcast licensees, during a short specified period before a general election, to devote a reasonable amount of time during the broadcast day to appearances where the candidate uses the station facilities as an "electronic soapbox." The broadcaster, as a public trustee, has a special obligation to present political broadcasts, and there is a marked deficiency as to longer candidate presentations in many races. There is thus a need for the Commission to flesh out this core responsibility of broadcasters as public trustees.

We urge that it is both lawful and sound policy for the Commission to adopt quantitative guidelines as to the amount of free programming time for candidates and the general times for broadcast, and advance the following proposal: that the period in which these broadcasts must be made available be confined to 30 days before the general election in even-numbered years and 15 days in odd-numbered years where there are fewer offices being the subject of campaigns; that for television, the amount of time to be devoted be 20 minutes each day, 6 a.m. to midnight, at least five minutes of which must be in prime time (with the other three five minute segments occurring in other day parts); and that in radio with its generally very short talk formats, the figures would be six minutes, with at least one minute segments, including one in "drive time." The proposal is a floor, not a ceiling. The licensee could consult with other stations in the area in determining the races in which such free time is to be offered, but the selection would be one solely within the licensee's discretion, as we believe is required under the statutory scheme.

We believe that this approach would obtain a significant contribution to the public interest in this vital area -- yet does not unfairly burden the broadcaster, is not unduly disruptive of its schedule, and leaves the licensee with the required greatest possible discretion as to the actual programming decision.

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(10.21.93)

Before the
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PETITION OF COMMON CAUSE, HENRY GELLER, THE BENTON FOUNDATION, AMERICAN ASSOCIATION OF RETIRED PERSONS, CENTER FOR RESPONSIVE POLITICS , ET AL., FOR INQUIRY OR RULEMAKING TO REQUIRE FREE TIME FOR POLITICAL BROADCASTS

1. Introduction. This petition is submitted by a group of non-profit, disinterested organizations described briefly in Appendix A attached hereto. The groups request that the Commission commence a proceeding, either of an inquiry or rulemaking nature, to adopt a policy requiring broadcast licensees, during a short specified period before a general election, to devote a reasonable amount of free time during the broadcast day to appearances where the candidate uses the station facilities as an "electronic soapbox." The licensee could consult with other stations in the area in determining the races in which such free time is to be afforded, but the selection would be one solely within the licensee's discretion, as we believe is required under the statutory scheme. The details of the proposal and the grounds therefor are discussed below.

2. The broadcast licensee, as a public trustee, has a special obligation to present political broadcasts. It is undisputed that broadcasters are public trustees, "...given the privilege of using scarce radio frequencies as proxies for the entire community..." (Red Lion Broadcasting Co. v. FCC, 396 U.S. 367, 397 (1969).[1] Two

[1] See also CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981). Significantly, the United States relied heavily on Red Lion in urging the constitutionality of the "must carry" provisions of the 1992 Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460. See Memorandum of Federal Respondents, Turner Broadcasting System, Inc. v. FCC, Case No. A-

recent laws, the 1992 Cable Act (see n.1) and the 1990 Children's Television Act[2] establish Congress' continuing recognition and stress of this concept: "... America's system of broadcasting ... is a unique scheme that emphasizes responsiveness to the local community and places the broadcaster in the role of public trustee for the frequencies it is permitted to use."[3] This is the peg on which the "must carry" requirement rests. Further, the broadcasters themselves, acting through their associations, have vigorously opposed spectrum usage fees or spectrum auctions specifically on the ground that they have a public service obligation and therefore cannot act like the usual business simply to maximize profits.[4] Significantly, the recent budget bill does exempt broadcasters from its auction provisions because of this public trustee responsibility.

The licensee necessarily has great discretion in fulfilling that public trustee role. But the Act makes clear that there are two public service areas upon which the broadcaster must focus: educational and informational programs for children (television licensees; see n. 2) and political broadcasts. As the Supreme Court made clear in Farmers Educational and Cooperative

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798, Oct. Term, 1992, at 3, 16, 18, 23, 25-26. Red Lion also established the constitutionality of the fairness doctrine and its rules and that the Commission does not exceed its authority "in interesting itself in ... the kinds of programs broadcast by licensees" (id. at 395).

[2] See Children's Television Act of 1990, Pub. L. 101-437, 101st Cong., 1st Sess., 47 U.S.C. Secs. 303a-b.

[3] S. Rep. No. 92, 102d Cong., 1st Sess. 42 (1991).

[4] See, e.g., Broadcasting Magazine, April 19, 1993, at 64.

Union v. WDAY, 360 U.S. 525, 534-5 (1959), that is the essential message of Section 315 of the Act:

> ...the thrust of section 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests...[5]

The legislative history of Section 312(a)(7) affirms this licensee duty to present political broadcasts. In 1971, in connection with campaign reform legislation, Congress added the "lowest unit rate" requirement of Section 315(b), and, fearful that broadcasters would then avoid political broadcasts, especially campaign commercials, it also inserted the requirement of Section 312(a)(7) that broadcasters afford reasonable access for candidates for Federal office. The Senate Report (No. 92-96, 92d Cong., 1st Sess. 28 (1971) states:

> The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC should continue to consider the extent to which each

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[5] The Commission and its predecessor agency, the Federal Radio Commission (FRC), from the earliest days, have taken into account whether a licensee has met its responsibilities in the field of political broadcasts. See Memorandum of the FCC Concerning Interpretation of Second Sentence of Section 315(a), FCC 63-412, Mimeo No. 34812, at 10. Thus, in the 1929 Great Lakes case, the FRC stated:

> In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves over which ...its political campaigns... may be broadcast. FRC 3rd Annual Report, at 32-36.

See, also, Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 P & F, R. R. 180 (1960).

> licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license. Certainly no diminution in the extent of such programming should result from enactment of this legislation.
>
> In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by [this law -- i.e., candidates for Federal office], S.382 conains an express provision [312(a)(7)] to this effect. (Emphasis added).[6]

There is one further background point before turning to the thrust of our petition. While the term "political broadcasts" largely connotes presentations by the candidate (usually in short commercials), there is another important facet -- the licensee's coverage of a campaign as part of broadcast journalism. Congress has soundly sought to promote this important contribution to an informed electorate by exempting such journalistic efforts as bona

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[6] See also the Senate Report, supra, at 34:

> The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the community of licensees. The Federal Communications Commission has recognized this obligation in its Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960).

As a "conforming amendment" needed in light of the new Section 312(a)(7), the legislation also added the underlined phrase to the second sentence of Section 315(a): "No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate." See S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess. 22. The purpose of this sentence is to make clear that the broadcaster is not a common carrier and that it can exercise discretion in selecting the races to be covered (but now with the exception specified in 312(a)(7) for Federal candidates). See Memorandum, cited in n.5, supra. We agree with this point concerning the broadcaster's wide discretion. See pp. 14-15, infra.

fide newscasts, news interview programs, documentaries, and on the spot coverage of news events, from the equal time requirement of Section 315(a). See 47 U.S.C. 315(a)(1)-(4). Such programming, which includes coverage of major party conventions or debates or the several interview shows and the extensive coverage in newscasts, has made a vital contribution. There is certainly room for criticism (such as the inordinate focus on the "horse race") but that is beyond the authority of the Commission (or any governmental body).

Our petition does not concern this facet. It focuses on the uncensored use of the station's facilities by the candidate themselves -- in their own language or presentations rather than through the editorial filter or selectivity of the broadcast journalist. In short, it is the candidate's use of broadcasting as an electronic speaking platform or soapbox.

3. Broadcasters should devote a reasonable amount of free programming time for candidates to use as an electronic soapbox.

The thrust of this petition is that the Commission, in an appropriate proceeding, should adopt a new policy that requires broadcasters, during a specified period before a general election, to afford a reasonable amount of free programming time for candidates to use as their electronic soapbox. First, we stress that in advancing this proposal, the groups are in no way seeking to effect campaign finance reform. Such reform is clearly needed[7],

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[7] Several of the organizations filing this petition have been long engaged in such reform efforts, and indeed, are now engaged in the pending legislative process in the Congress. The Benton Foundation is not involved in pending legislative action. See,

but the proposal here not a solution to campaign finance reform, and, equallly important, such reform is a matter beyond the expertise of the Commission.[8] Rather, the petition is based squarely on fleshing out a core responsibility of broadcasters as public trustees.

Significantly, there has been a seachange in this respect from the last decade when the watchword was deregulation and reliance upon the marketplace. As stated, Congress enacted the 1990 Children's Television Act, requiring licensee and Commission focus (at renewal) on whether the educational and informational needs of children have been served, including by programming specifically designed to do so. The Commission recently issued a Notice, proposing, inter alia, that there be a "core" programming definition of such public service programming for children and that a quantitative processing guideline be adopted for use at renewal time.[9]

Essentially we propose the same approach for this area. Congress has similarly singled it out as a matter of special focus

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e.g., Cong. Rec. S7448-7462, June 17, 1993. In their view, as stated above, adoption of this proposal is definitely not the answer to campaign finance reform and does not in any way obviate the need for such reform measures.

[8] We thus agree with the main ruling in the Memorandum Opinion and Order in the Matter of Petitions for Rule Making to Require Free or Lower Cost Time by Candidates for Public Office..., 37 P & F, R.R. 2d 489, 491 (par.6). We recognize that, especially at this time, the Commission is not going to act to effect campaign reform, but as shown, it clearly has authority to act to insure programming operation consistent with the public interest.

[9] In the Matter of Policies and Rules Concerning Children's Television Programming, MM Docket No. 93-48.

at renewal time. See 2-4, supra. There is, we believe, a similar need for specific focus on one aspect -- the provision of free programming time for the candidates -- and for a reasonable quantitative approach, whether by rule or policy or processing guideline. Even the most cursory examination of broadcast operations during campaign periods establishes that there is a considerable amount of journalistic efforts (including debates, interviews, news excerpts, etc.) and of commercials purchased by candidates, and very little programming time afforded for longer presentations by the candidates.[10] Our proposal is designed to remedy that deficiency.

As a practical matter, the present campaign structure runs to very heavy emphasis on the spot announcement. It may be argued that this is not the fault of the broadcast industry but of the candidates themselves, who could purchase programming time but, for

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[10] For example, we looked to the last political broadcast survey conducted by the FCC, Report on Political Broadcasting and Cablecasting, Primary and General Election Campaigns of 1972, March, 1973, and to the races which would be expected to be most in need of additional longer presentations (see 14, infra). Examination of Tables 3 (Senatorial Candidates; General Election); 5 (Congressional Candidates; General Election; 7 (Gubernatorial Candidates; General Election) and 9 (Lt. Governor Candidates; General Election) establishes that in the very great majority of states, the charges for spot announcements amounted to over 90% of the political charges by broadcast stations and often was 100%. Similarly, in the 1968 FCC political broadcast survey showed that in 1968, of the $49.3 million political charges by broadcast stations, 91% was for spot announcements and only 9% was for program time. More than 5 million political commercials were broadcast in that year. FCC Release, 36689, Aug. 27, 1969. This facet, the small amount of programming time for uncensored ("soapbox") political presentations, is clearly a matter to be thoroughly explored in the proposed proceeding.

by far the most part, much prefer spot announcements; that the Communications Act, practically speaking, reflects this preference since, in the course of campaign reform legislation, it provides preferentially low rates (the lowest unit charge requirement of 315(b)) used very largely for these spot announcements; and indeed, the proposed reform legislation now pending would further reduce the charges for such commercial time.[11] There is no question but that this large preference for spot announcements is the reality, and that the Congressional scheme for campaign finance reform, especially the proposal now under consideration, therefore focuses on that reality.

But so also must the broadcaster and the Commission take into account that reality and the crucial fact that it results in a dearth of programming presentations by the candidates. There is an obvious difference between the short commercial and the longer programming presentation in contributing to an informed electorate on the campaign issues. No useful purpose would be served by going into the question of whether the political spot announcement -- some of only eight seconds duration -- well serves the democratic process. Unlike in the United Kingdom and many other countries, the political spot is a fixture in the U.S., does contribute to the political debate, and is entitled to full First Amendment protection. The question for the broadcaster and the Commission is whether the public trustee scheme calls for some significant contribution by the broadcast industry to more in-depth information

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[11] See Section 131 of S. 3, 103rd Cong, 1st Sess.

on campaign issues as presented by the candidates. We believe that it clearly does.

As a further matter, we point out that not all races receive broadcast exposure, either in journalistic programs or commercials. There are many Congressional or local races of considerable importance where the purchase of commercial time or coverage in news-type shows is minimal or lacking. So here again, acting as a public trustee, the broadcaster can fill a gap in contributing to the informed electorate, so crucial to the proper functioning of our democracy.

Again, we must stress how much has been given the broadcaster -- the free use of valuable spectrum in exchange for public service, "must carry" on cable systems "...because television broadcasting plays a vital role in serving the public interest ...[including] public affairs offerings..."[12] It is the heart of our petition that it is therefore reasonable to require the broadcaster to make a substantial contribution in the core public service area of longer duration political programming.

This is not a comparative matter between the broadcasting and cable industries; as stated, our position rests on the public trustee scheme applicable to broadcasting. But the comparison is nevertheless instructive: Cable presents informational programming such as CNN and local or regional newscasts, and subsidizes a marvelous public affairs channel, C-SPAN 1 and 2; in addition it provides public, educational and governmental channels, and can be

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[12] See S. Rep. 102-92, 102d Cong., 1st Sess., 41-42.

assessed franchise fees up to 5% of gross revenues (now totalling roughly $800 million a year). Broadcasting of course does render very substantial public service in its news and informational endeavors. As noted, however, it resists any assessment of a spectrum usage fee on the ground that it is obligated to render public service at the expense of profits. Surely it is then not unreasonable to require a significant contribution in this crucial area of political programming.

4. The proposal is reasonable, affords great discretion to the licensee, and is not burdensome or disruptive.

We believe that there should be quantitative guidelines as to the amount of free programming time for candidates and the general times for broadcast. The Commission clearly has the authority to so proceed.[13] We urge that it should do so for two reasons. First, as shown by past experience (including the recent situation as to implementation of the 1990 Children's Television Act, without such quantitative guidelines, the policy is simply too "mushy" and runs the clear danger of being ineffective. Second, in this

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[13] See Sections 303(b), 303(r), 4(i), 307, 309, 312(a)(7) and 315. If, as Red Lion holds (395 U.S. at 393), the Commission can properly require licensees "to give adequate and fair attention to public issues...", it follows, under U.S. v. Storer Bctg. Co., 351 U.S. 192 (1956) and FCC v. ABC, 347 U.S. 284, 289 n.7 (1954), and the above cited sections, that the Commission can prescribe by rule or policy what constitutes "adequate" attention to this category of public issues (free programming presentations by the candidates), to obtain a renewal. Indeed, prior to the deregulatory actions of the 1980's, with their reliance on the marketplace, the Commission used processing guidelines to assess whether licensees had met their public interest responsibilities in presenting news, public affairs and other non-entertainment programming. Whether the Commission proceeds by rule or processing guideline, the applicant is entitled to make a showing as to why its renewal should be granted in the particular circumstances.

sensitive First Amendment area, we urge that it is wrong not to let the licensee and the public know what the ground rules are. The renewal applicant is going to assessed on this score; to hold that its renewal must be denied because of inadequate performance in this respect, without any prior guidance, contravenes the First Amendment.[14] Further, by meeting the guideline, the incumbent will not suddenly find itself at a disadvantage in a comparative renewal proceeding.

The approach should be one that constitutes a significant contribution -- yet does not unfairly burden the broadcaster, is not unduly disruptive of its schedule, and leaves the licensee with the greatest possible discretion as to the actual programming decision, as is required by the statutory scheme in the broadcast field. See CBS v. DNC, supra.

Accordingly, we suggest as the point of departure for study and comment the following proposal: that the period in which these broadcasts must be made available be confined to 30 days before the general election in even-numbered years and 15 days in odd-numbered years when there are fewer offices being the subject of campaigns; that for television, the amount of time to be devoted be 20 minutes each day, 6 a.m. to midnight, at least five minutes of which must be in prime time (with the other three five minutes segments

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[14] See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.D.C.1970), cert. denied, 403 U.S. 923 (1971) ("... a question would arise whether administrative discretion to deny renewal expectancies, which must arise under any standard, must be reasonably confined by ground rules and standards...").

occurring in other day parts)[15]; and that in radio with its generally very short talk formats, the figures would be six minutes, with at least one minute segments, including one in "drive time."

We believe that the daily amount is not burdensome, is confined to a narrow window each year, and can be accommodated without disrupting the program schedule. In television, for example, the five-minute segments could be inserted at the end of some half-hour program, with no disruption of the schedule. A number of programs were produced in past elections tailored to such insertion, and could be again so designed, if this approach were adopted.[16]

While we propose this approach in order not to be burdensome [17] or disruptive, we point out that it does accomplish a great

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[15] Alternatively, two of the five-minute segments could be required to be broadcast in prime time.

[16] See also WGN Continental Broadcasting Co., 58 FCC2d 1142 (1976), where in the 1976 campaign WGN had refused to sell short spot announcements to candidates, on the ground that political issues should not be "hawked" like a commercial product; it had numerous five minute segments and some 15 and 30 minute segments available. The Commission ruled against the licensee. But see dissenting opinion of Commissioner Robinson, at 1145; Rosenbush Advertising Agency, Inc. , 31 FCC2d 782 (1971) (permitting a policy of political spots being at least five minutes duration). See also pending NAB request for declaratory ruling, dated August 17, 1992, that stations need not provide candidates for Federal office program time in increments other than those the stations ordinarily sell to commercial advertisers or ordinarily program.

[17] The amount of time in these narrowly confined annual windows could readily be sustained, particularly with the adjustment in program length described above. It may be argued that many broadcasters, especially in AM radio and UHF independent operations, are losing money. That is true, but it also means that there is ample room for these five-minute (or indeed longer) presentations on such losing operations. In any event, like the

deal: It would afford the opportunity for the candidates to present a much more in-depth discussion of the important campaign issues than is possible in the short spot announcement; it would be free and thus would be available for some candidates who have been unable to purchase television time; and it could become a focal point in the campaign -- a mini-debate between the candidates, sharpening their differences and informing and interesting the public.

We also point out that the proposal is simply a floor -- not a ceiling. This is not some rigid scheme that must be adhered to. Licensees would be free to adopt political programming plans that differ by going beyond this "floor" plan. They could, for example, employ longer segments, even of a half-hour duration;[18] they could slot the candidates, back to back, with each having 15 segments.[19] The variations are numerous and would be left to the licensee's discretion. The "floor" simply assures satisfaction of this core responsibility and thus renewal, so far as this criterion is concerned.

The licensee would also have complete discretion as to the races to be offered such time, in accord with the broadcast statutory scheme. Of course, we would hope that licensees would

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children's television requirement, this is a core public service responsibility in exchange for free use of the valuable spectrum (and other benefits).

[18] Noncommercial stations particularly might use longer segments.

[19] See pp. 14-15 for the "equal time" benefits of so proceeding.

focus on races that are significant and important to their communities -- yet have not been covered extensively in other political programming or even at times commercial announcements. But we also recognize that every race, even ones that receive the most attention, would benefit from the extension of free time along these lines. Take, for example, the last Presidential campaign when, in addition to the debates, interviews on news shows, commercials, etc., there was an unprecedented number of appearances on talk show programs, MTV, late night shows, etc. Suppose the networks had afforded the three candidates 10 minutes each in several 30-minute programs to set out their views on the great issues of the campaign (e.g., the economy, including the budget deficit; health care; foreign policy), or had decided to present the Sunday evening political program proposed by the Joan Shorenstein Barone Center of Harvard University.[20] No one could seriously dispute that such in-depth programming would have been a most worthwhile addition in informing and interesting the public.

It follows, we believe, that under the statutory scheme, the licensee must have complete discretion, unreviewable by the Commission or any governmental entity, as to the races to be selected for this free allotment of programming time. Further, while we would hope that the licensees in any given area would consult with one another, so that significant races are not omitted, this again is a matter solely for the licensees' judgment.

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[20] John Ellis, "Nine Sundays: A Proposal for Better Presidential Campaign Coverage," Joan Shorenstein Barone Center, John F. Kennedy School of Government, Harvard University, Sept. 1992.

There remains the question of the equal opportunities requirement of Section 315. Where there are no fringe party candidates (e.g., Socialist Labor; Libertarian; Vegetarian; etc.), this poses no problem: The licensee could present the major party candidates (or any serious third party candidate) in rotating order in these 5-minute segments (with each getting an opportunity in prime time). Where there are fringe party candidates as in the Presidential race,[21] the licensee could make use of the recent King ruling[22], exempting under 315(a)(4) back-to-back presentations of candidates from the equal opportunities requirement; in television, it could present, say, the two major party candidates, back to back, in 2 and 1/2 minute segments; in radio the division might be where each gets half of a minute-and-a-half segment. This would have the advantage of being even more of a confrontation on the issues, with the same audience hearing both sides; the disadvantage would be the reduced time for each of the candidates to explain their positions. Again, use of this arrangement, either to create more interest or because of the presence of fringe party candidates, would be a matter for the licensee's judgment.

This then would be the outline of the proposal which we urge would markedly promote the "larger and more effective use" of broadcasting in the public interest (Section 303(g); NBC v. U.S., 319 U.S. 190, 216 (1943). It could be accomplished either through

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[21] See King Broadcasting Co. v. FCC, 860 F.2d 465, 467 (D.C. Cir. 1988).

[22] See King Broadcasting Co., 6 FCC Rcd 4998 (1991), dealing with the remand in King Broadcasting Co. v. FCC, supra.

a rule or a policy, with processing guidelines. In either case, it would, we believe, be effective to accomplish its important goals.

For legal reasons, we do not suggest that the proposal include cable television. We recognize the growing importance of cable programming and that for the most part, the audience makes little distinction as to whether it is watching an over-the-air or cable programmer in switching channels in cable households, now in over 60% of the U.S. TV households. We would hope that just as in the recent case of the television violence issue,[23] cable would voluntarily take up this question also and consider its responsibilities to the public. But we believe that the Commission is foreclosed from proceeding in light of the proscription in Section 624(f)(1) on any new Federal or State agency content regulation not in existence at the time of the 1984 Cable Act.

Congress has always shown great interest in this area of political broadcasts. Thus, it might take up this question of free programming time, broadcast in order to fulfill a core responsibility of the broadcast licensee as public trustee. It could thus not only definitively set the general policy, as it did in the area of children's television programming, but it could also deal with such issues as including cable television or the problem of equal time in the situation involving fringe party candidates. But of course, no one can say whether or not Congress will turn to this matter, and this petition is not intended to influence congressional action. This petition is thus directed to the

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[23] See Broadcasting Mag., July 5, 1993, at 10.

Commission because we strongly urge that it is time -- indeed long past time -- for effective action by the Commission in this area, so important to democratic processes.

5. No Congressional enactment precludes adoption of this policy.

Finally, we deal here with the argument that this is an area which has been totally occupied by a comprehensive Congressional scheme, leaving no room for agency action along the above lines. This is clearly not the case.

The starting point for analysis of this issue is "the language employed by Congress" (CBS, Inc. v. FCC, supra, 453 U.S. at 377). There is no statutory language precluding the proposed FCC action as to free programming time for candidates. As shown by Section 624(f)(1) (supra, 17), Congress knows how to make clear its intention to confine the agency role when it wants to do so.

Here on the contrary, Congress has stressed in the statute and legislative history its full agreement with the Commission that affording time for political broadcasts is a crucial part of the public interest requirement for renewal of license. See 1-4, supra. The Supreme Court has stressed the same value as vital to the First Amendment -- as the very "essence of self-government." CBS, Inc. v. FCC, 453 U.S. at 396. The Commission here would be fleshing out a part of that crucial public interest responsibility in light of a significant deficiency. As shown, the agency has ample authority to do so in the plain terms of the statute. See n.13.

We believe that the preclusion argument may stem from confusion between what Congress has done in the area of campaign

finance reform and what the public trustee obligation can entail in this area. While the reform process appears to be still evolving, Congress has delineated a scheme for candidate access to paid time as a facet of campaign finance reform. The Commission can adopt and has adopted rules and interpretations to carry out that scheme.[24] In doing so, the Commission must act consistently with the statutory requirements; it could not, for example, change the rate approach or time periods specified.

But this campaign finance reform legislation is directed "...to a right of reasonable access to the use of stations for paid political broadcasts on behalf of ... candidacies..." (CBS, Inc. v. FCC, 453 U.S. at 382. It does not deal at all with the issue of free time for political programming in order to fulfill a public trustee need. We stress again that this modest free time proposal has nothing at all to do with campaign finance reform, and indeed, if promulgated, would not in any way obviate the need for such reform in the view of petitioners (and any common sense evaluation of the marked differences between the approach proposed here and that under consideration in the Congress). See n.7, supra.

The soundness of our position is pointed up by considering a hypothetical situation. Suppose the Commission had adopted a free time programming approach similar to that here proposed in 1970, a year before the 1971 Federal Election Campaign Act. There can be no doubt that the Commission would have had the

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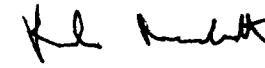
[24] See, e.g., the recent action on "lowest unit rate," In the Matter of Codification of the Commission's Political Programming Policies, 7 FCCrcd 678 (1992); recon., 7 FCCrcd 4611 (1992).

power to so proceed; that Congress would have enacted the 1971 reform legislation to reduce the cost and enhance paid access to the electronic media, especially for the spot announcement so much in demand; and that Congress would have left intact the Commission's modest requirement for free time for programming presentations in light of its clear emphasis on the desirability generally of political broadcasts. We submit that the Commission has the same power today to act to promote the public interest in the broadcast field in this important respect.

CONCLUSION

For the above reasons, we urge the Commission to promptly issue a Notice of Inquiry and Proposed Rule Making, so that a proposal along the foregoing lines can be the subject of study and comment, and, we would hope, definitive action before the next election period.

Respectfully submitted,



Richard Neustadt

Henry Geller

1750 K Street, N.W., Suite 800
Washington, D.C. 20006
202-429-7360
October 21, 1993

APPENDIX A

ET AL:

American Association of Retired Persons

Benton Foundation

Common Cause

Dick Clark, former US Senator (D-IO), current Senior Fellow & Director of the Congressional Program, Aspen Institute

Center for Responsive Politics

Democratic Leadership Council

Henry Geller

Public Citizen

The Honorable Lionel Van Deerlin, former chairman of the Subcommittee on Communications, U.S. House of Representatives